No. 01-1719

Supreme Court, U.S.
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In The

Supreme Court of the United States

STAR SCIENTIFIC, INC.,

Petitioner,

v.

JERRY W. KILGORE,
in his official capacity as Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent takes issue with Petitioner's statement of Questions Presented and re-states the questions as follows:

1. A Virginia statute requires Petitioner – a Virginia-based cigarette manufacturer – to choose between (a) making interest-bearing, refundable escrow payments in order to secure payment of future health-related claims, or (b) joining the previously-negotiated Master Settlement Agreement (MSA), and thereby paying certain non-refundable amounts and relinquishing certain advertising and other rights.

    a. Is the Equal Protection Clause implicated at all where petitioner has the option to decide which set of obligations will govern its conduct?

    b. If so, was the court of appeals correct in holding that the statute's classification of cigarette manufacturers is rationally related to a legitimate State interest?

2. The obligations that Petitioner challenges arise under the Virginia statute, not under the MSA. The MSA does not impose any obligation on Petitioner; and, contrary to Petitioner's assertion, the MSA does not require Virginia to pass the challenged statute.

    a. Does Petitioner have standing to challenge the MSA?

QUESTIONS PRESENTED – Continued

b. If so, does the MSA require Congressional approval under the Compact Clause, even though the MSA does not increase State power at the expense of the Federal Government?

c. If so, did Congress give its consent to the MSA when it amended the Medicaid statute, in 1999, disclaiming any portion of the recovery of the States?

3. The Virginia statute calculates the amount of Petitioner's escrow payments based on the number of Petitioner's cigarettes sold at retail in the Commonwealth in the preceding year. Although Petitioner may sell some of its cigarettes to out-of-state parties, who then ship them back into Virginia, the escrow figures are readily obtainable based on the number of Virginia excise tax stamps affixed to Petitioner's cigarettes before they are sold at retail. Was the court of appeals correct in holding that such an arrangement does not violate the dormant Commerce Clause?

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STATEMENT OF THE CASE

In November 1998, Respondent Attorney General of Virginia joined with elected officials of 45 other States, the District of Columbia, the Commonwealth of Puerto Rico, and four United States territories (the "Settling States") in signing what this Court has termed a "landmark agreement," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001). By that agreement, generally referred to as the Master Settlement Agreement or "MSA," the Settling States took a major step towards addressing "tobacco use, particularly among children and adolescents," which this Court has recognized as posing "perhaps the single most significant threat to public health in the United States." *Id.* at 570 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000)).

The Terms of the MSA

In exchange for a release from the Settling States from past and future liability on claims seeking to recover, *inter alia*, the increased health care costs incurred by the States on account of smoking-related disease, signatory companies to the MSA ("Participating Manufacturers") shouldered a variety of restrictions designed to reduce smoking, particularly among minors, (*e.g.*, prohibitions on targeting youth in cigarette advertising through the use of cartoon characters or otherwise).[1] App. 97a-118a, MSA

[1] According to a recently released study by a federal inter-agency task force, since the MSA took effect there has been a marked decline in smoking among adolescents from the record levels immediately prior to the MSA's execution. *See* Federal Interagency Forum on Child and

(Continued on following page)

§ III. Participating Manufacturers agreed to make annual payments of billions of dollars to compensate the Settling States for a portion of the past and future damage inflicted by their cigarettes. App. 121a-158a, MSA § IX.[2]

As defined in the MSA, Original Participating Manufacturers ("OPMs") are the four large tobacco companies that were among the defendants in the lawsuits pending at the time of the Agreement. App. 87a, MSA § II (hh). The OPMs initially will bear the great bulk of the annual MSA payments. Subsequent Participating Manufacturers ("SPMs") are other tobacco companies that have voluntarily joined the MSA after its original execution. App. 94a, MSA § II (tt). To encourage tobacco companies to accept the Agreement's marketing restrictions and other public health provisions promptly and voluntarily, SPMs were provided an incentive to join within the first 90 days after execution. While fully subject to the MSA's public health provisions and conduct restrictions, those early-settling SPMs are required to make settlement payments only to the extent their future sales exceed specified presettlement market sales levels. App. 151a-154a, MSA § IX (i). SPMs who join after the first 90 days do not receive the benefit of the MSA's "grandfathering" provision. They, too,

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Family Statistics, *America's Children: Key National Indicators of Well-Being* (2001) (at **http://www. hildstats.gov /ac2001 behtxt.asp#beh1**).

[2] Under the MSA, the Commonwealth receives approximately 2.05 percent of these payments, with the Commonwealth's share projected to be roughly $4.1 billion through the year 2025. App. 163a, MSA Ex. A. Because all sums payable under the MSA are subject to adjustments based on factors such as inflation and changes in sales volume, precise payment amounts are impossible to predict.

however, can settle their past and future liability to the Settling States by becoming parties to the MSA.

The signatories to the MSA recognized that some cigarette manufacturers might decline to settle with the States. Those Non-Participating Manufacturers ("NPMs") have *no obligations* under the MSA. *None* of the Agreement's public health provisions and sales and marketing restrictions apply to them, nor are they obligated to make *any* payments to the States. Correspondingly, the Settling States expressly preserved in the MSA all their past and future claims against NPMs. MSA § XVIII (t) (Portions of the MSA not included in the Appendix are found in the Lodging).

The Virginia Escrow Statute

In February 1999, Virginia's decision to settle with the Participating Manufacturers under the terms of the MSA was approved by the City of Richmond Circuit Court as "in the best interests of the Commonwealth." Shortly thereafter, the Virginia General Assembly enacted legislation. See App. D.[3] Pursuant to that legislation, tobacco manufacturers whose cigarettes are sold in Virginia are given a choice:

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[3] Petitioner asserts that the MSA "requires Settling States to enact 'Qualifying Statutes' . . ." and to diligently enforce and defend those statutes against court challenges. Pet. 7. In fact, there is no such requirement in the MSA. Rather, the MSA provides incentives to each Settling State to enact, enforce, and defend a statute so that the State can thereby avoid potential reductions in settlement payments should Participating Manufacturers in the aggregate lose more than 2 percentage points in market share found to have been attributable to disadvantages of the Agreement. However, none of Star's arguments for certiorari appear to turn on this mischaracterization.

They may either join the MSA and thereby obtain a release of the Commonwealth's tobacco-related claims against them, or make refundable, interest-bearing escrow deposits keyed to their cigarette sales volume in Virginia. App. 67a-76a, Va. Code §§ 3.1-336.1 & 3.1-336.2 (Michie Cum. Supp. 2002) (together, "the escrow statute"). In enacting the escrow statute, the Virginia General Assembly expressly found that:

> cigarette smoking presents serious public health concerns to the Commonwealth and to the citizens of the Commonwealth. . . . [S]moking causes lung cancer, heart disease and other serious diseases, and . . . there are hundreds of thousands of tobacco-related deaths in the United States each year. These diseases most often do not appear until many years after the person in question begins smoking. . . . [C]igarette smoking also presents serious financial concerns for the Commonwealth, [which] pays millions of dollars each year to provide medical assistance for [persons with] health conditions associated with cigarette smoking.

(App. 67a-68a).

The General Assembly declared that "it is the policy of the Commonwealth that financial burdens imposed on the Commonwealth by cigarette smoking be borne by the tobacco product manufacturers rather than by the Commonwealth." App. 68a. The legislature was concerned, however, that NPMs – which at the time were manufacturing large numbers of cigarettes that lead to smoking-related disease and impose huge health care costs on the States – might be judgment-proof if and when called upon to pay for the damages their products had caused and thus would escape their potential liability. App. 68a-69a.

Particularly troublesome was the fact that such damages might not become manifest until years after an NPM had entered the market, and perhaps after it had long since exited it. *Id.* Virginia also was concerned about the prospect that NPMs – unburdened by either the MSA's public health restrictions or the obligation to bear the costs of smoking reflected in the settlement payments – would exploit their low costs and commercial advantage to unleash a flood of new cigarettes on the Commonwealth. *Id.* The escrow statute was designed to require NPM's to take account of the harm their products cause. It requires all NPMs to deposit annually fixed amounts into escrow based on the sales of their cigarettes in the Commonwealth, thereby providing a secure source of recovery for future liability. The escrow amount roughly approximates the per cigarette settlement payments of SPMs, and it cannot exceed the amount on a per-cigarette basis that the Commonwealth would receive from the NPM if it were to become an SPM. App. 73a-75a, Va. Code §§ 3.1-336.2(A)(2), 3.1-336.2(B)(2). For 2001 sales, the maximum escrow amount, unadjusted for inflation, was roughly 1.4 cents per cigarette. This amount will increase to roughly 1.9 cents by 2007. App. 74a, Va. Code § 3.1-336.2(A)(2).

As the district court below found, "[t]he amount of money that NPMs are required to place in escrow is directly connected to the impact of its tobacco products in the Commonwealth." App. 55a. According to the most recent information available from the Centers for Disease Control of the U.S. Department of Health and Human Services, smoking-attributable Medicaid expenditures for Virginia in 1998 exceeded $310 million. *Investment in Tobacco Control, State Highlights, 2002: Impact and Opportunity*, p. 121, United States Department of Health and Human Services, Centers for Disease Control and

Prevention. Given that approximately 700 million packs of cigarettes were sold in the Commonwealth in that year, see Orzechowski & Walker, *The Tax Burden on Tobacco*, vol. 35 (2000), Table 10, p. 29, the per-cigarette smoking-attributable Medicaid costs to the Commonwealth alone totaled more than 44 cents per pack, or approximately 2.2 cents per cigarette. In light of the continuing increases in health care costs since 1998, the average cost to the Commonwealth for each cigarette sold today is undoubtedly well above both the MSA settlement amounts and the escrow costs under the escrow statute.

Unlike settlement payments made by Participating Manufacturers, which immediately become the Commonwealth's property, the funds deposited in escrow by an NPM remain its asset unless and until Virginia obtains a settlement or judgment of tobacco-related claims against the NPM. App. 74a, Va. Code § 3.1-336.2(B)(1). Moreover, NPMs receive interest or other earnings on their escrow deposits, and those amounts are paid out free and clear to the depositing NPM "as earned." *Id.* The escrow statute requires the principal amount of each annual payment to be held in escrow for 25 years because of the substantial latency of the damage caused by cigarettes currently sold in the Commonwealth. *See id.* If there is no judgment or settlement within 25 years, the applicable escrow installment reverts to the NPM. App. 75a, Va. Code at § 3.1-336.2(B)(3).

Petitioner and the Litigation Below

Petitioner Star Scientific, Inc., through its Virginia-based subsidiary, Star Tobacco, Inc. (collectively "Star"), manufactures and sells discount cigarettes but has not

joined the MSA. Star's cigarettes are, as Star's own labels admit, addictive and lethal.[4] Those cigarettes will doubtless cause health problems and disease leading to the premature death of large numbers of Virginians in the coming years – and in the process impose millions of dollars of health care costs on the Commonwealth.

Although Star had every opportunity to join the MSA at the outset and thereby gain a "grandfathered" market share and reduced settlement payments, it chose not to do so. Instead, in January 2001, Star brought suit against the Attorney General of the Commonwealth seeking an injunction against enforcement of the escrow statute's requirements. Star alleged that the MSA violated its rights under the Commerce and Compact Clauses, and that the escrow statute should be held unconstitutional on Equal Protection, substantive Due Process, Commerce Clause, and Takings grounds. Like every other court to have considered similar claims,[5] the district court granted

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[4] Although Star prefers to focus on its development of a potentially less deadly, but totally unproven, specially-cured tobacco, Pet. 9-10, its primary business is, in fact, the manufacture and sale of discount cigarettes – cigarettes that contain an overwhelming proportion of ordinary tobacco and only a small amount of Star's specially-cured tobacco. In any event, as Star expressly admitted in connection with its test marketing of cigarettes containing its specially-cured tobacco: "There is no such thing as a 'safe' cigarette!" Pet.10.

[5] *See Mariana v. Fisher*, CV-01-2070 (M.D. Pa. June 17, 2002), *appeal docketed*, No. 02-2906 (3d Cir. July 10, 2002) (Commerce Clause, Compact Clause); *Freedom Holdings, Inc. v. Spitzer*, No. 02 CIV. 2929 (S.D.N.Y. May 14, 2002), *appeal docketed*, No. 02-7492 (2d Cir., May 16, 2002) (Commerce Clause challenge to statute related to escrow statute); *Forces Action Project, LLC v. State of California*, No. C99-0607MJJ (N.D. Cal. Jan. 15, 2002), *appeal docketed*, No. 02-15336 (9th Cir. Feb. 14, 2002) (motion to amend complaint to add Commerce Clause claim

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the Attorney General's motion to dismiss Star's complaint. It dismissed Star's challenge to the MSA for lack of subject matter jurisdiction, holding that Star lacked standing. The district court likewise dismissed Star's constitutional challenges to the escrow statute. Noting that

> [w]ithout the NPM statute, tobacco manufacturers that are free to participate in the unrestricted marketing and promotion of a product that is unquestionably harmful to the health of the citizens of the Commonwealth would be able to collect profits while inflicting damage that will not manifest for years to come, and possibly leave the Commonwealth holding the bag,

App. 55a, the district court found that the legislation reflected legitimate classifications based on rational economic regulation and upheld the escrow statute against Star's Equal Protection challenge. The district court also rejected Star's claim that the escrow statute has an impermissible extraterritorial effect in violation of the dormant Commerce Clause because Star, a Virginia cigarette manufacturer, could lawfully be required "to bear

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denied on ground of futility); *North American Trading Co. v. National Ass'n of Attorneys General*, Civ. Action No. 01-01600 (D.D.C. Sept. 17, 2001), *appeal docketed*, No. 01cv01600 (D.C. Cir. Feb. 26, 2002) (Commerce Clause); *Star Scientific v. Carter*, IP 01-0838-C T/G (S.D. Ind. Aug. 20, 2001) (Commerce Clause); *PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp. 2d 1179, 1193 (C.D. Cal. 2000) (Compact Clause, Commerce Clause, equal protection); *Hise v. Philip Morris Inc.*, 46 F. Supp. 2d 1201 (N.D. Okla. 1999), *aff'd*, 208 F.3d 226 (10th Cir.), *cert. denied*, 531 U.S. 959 (2000) (Compact Clause).

the responsibility for the future impact of *its own product* in the Commonwealth." App. 60a (emphasis in original).[6]

On appeal to the Fourth Circuit, Star presented Due Process, Equal Protection, and Commerce Clause challenges to the escrow statute (The MSA was attacked under the Compact Clause, discussed below). The appeals court reviewed the judgment of the district court *de novo* and reached the same conclusion.[7] The court of appeals also applied well-established law in affirming the district court's dismissal of Star's Equal Protection and Commerce Clause claims. As to the former, the court found the distinction in the escrow statute between Participating Manufacturers and NPMs to be "rationally related to Virginia's efforts to redress alleged wrongdoing and, at the same time, to assure a future source for covering the costs of cigarette smoking from all tobacco manufacturers." App. 24a. With regard to Star's dormant Commerce Clause challenge, the court held that the escrow statute neither has "the 'practical effect' of controlling prices or transactions occurring wholly outside of the boundaries of Virginia" nor imposes a burden on interstate commerce that is " . . . 'clearly excessive' when compared to the putative local benefits" of the law. App. 29a, 31a.

The court of appeals disagreed with the district court's conclusion that Star lacked standing to challenge the MSA under the Compact Clause. App. 33a-36a. Reaching the merits of Star's Compact Clause claim, however, the court

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[6] Star's Due Process and Takings Clause grounds were also rejected by the district court.

[7] The court of appeals rejected Star's Due Process claims. App. 17a.

of appeals affirmed its dismissal. According to the court, for the most part the MSA "operates vertically," providing releases from Settling States to Participating Manufacturers in exchange for monetary payments and conduct restrictions. The provisions of the agreement by which Virginia and the other Settling States agreed to utilize third parties to resolve certain issues under the MSA did, according to the court, provide a horizontal element that "establishes a compact among the States." App. 37a. The court further concluded, however, that the compact "does not increase the power of the States at the expense of federal supremacy and that, therefore, it is not an interstate compact requiring congressional approval under the Compact Clause." App. 38a.

Star's subsequent petition for rehearing and suggestion for rehearing en banc were denied, and this petition for certiorari followed.

REASONS FOR DENYING THE PETITION

SUMMARY

Star's petition is utterly devoid of reasons why this Court should exercise its discretion to grant certiorari. Invoking Sup. Ct. R. 10(c), Star contends that its Equal Protection Clause and Compact Clause claims raise "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." Pet. 15. The Fourth Circuit, however, disposed of those claims by applying legal principles that are well-settled by this Court's jurisprudence. Star also attempts to find a conflict between the Fourth Circuit's decision on Star's Commerce Clause challenge to the escrow statute and decisions of this Court

and of the First Circuit. The latter decisions, however, involved very different situations from the present one and are easily reconcilable with the result below. Star's petition, therefore, presents no "compelling reasons," Sup. Ct. R. 10, for this Court to grant review.

Basically, Star's argument for review rests on its supposed ability to discern the "real" purposes of the MSA. Star concedes that its cigarettes "are addictive and pose serious health hazards," Pet. 10, and that the Commonwealth has a legitimate interest in "assuring that tobacco manufacturers bear the future costs of smoking-related illness," *id.* 17. Yet Star insists that the findings made by the Virginia General Assembly in the course of addressing these issues are a sham and urges this Court to ignore them. Instead, Star contends that the MSA should be regarded as an illegitimate "scheme" by which "the Attorneys General and legislatures of these jurisdictions undertook concerted action to regulate and cartelize the national market in cigarettes, entrenching the oligopoly position of the 'Big Four' tobacco defendants."[8] *Id.* 2.

Star's characterization of the MSA is as inaccurate as it is overwrought. In entering into that "landmark agreement," *Lorillard*, 533 U.S. at 533, Virginia and the other

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[8] Star mischaracterizes the decision in *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 813 (2002), by asserting that the Third Circuit "acknowledged" that the MSA arrangement would amount to a classic conspiracy in restraint of trade absent doctrines of state antitrust immunity. Pet. 2. In fact, the *Bedell* decision, in affirming the district court's dismissal of the complaint, addressed only the complaint's allegations. 263 F.3d at 246 n.20. Those allegations were denied by the defendants and were never put to the test of proof.

Settling States acted well within their traditional police powers in settling claims for the health and financial burdens created by the tobacco companies' products. Those settlements were on terms that, in exchange for a release of the States' claims, provide financial relief to the States and significantly modify the companies' marketing, promotional, and advertising practices. The Commonwealth also acted well within its traditional powers in addressing, through enactment of the NPM statute, the issues posed by non-settling tobacco companies, such as Star, which contribute nothing to the settlement, assume none of its public health and promotional restrictions, and in turn receive no release of claims. The statute simply ensures that there will be a source of recovery if an NPM is subsequently held liable for the financial burdens that its products impose on the States. The Commonwealth was particularly justified in doing so to ensure that the NPMs would not take advantage of their lower costs vis-à-vis the Participating Manufacturers to expand their markets and stimulate demand for a deadly product, both undermining the substantial health benefits of the MSA and, in the words of the district court below, leaving the Commonwealth "holding the bag." App. 55a.

The Fourth Circuit fully understood and clearly explained these considerations, App. 38a-41a, and properly rejected Star's characterizations of the MSA and escrow statute as well as Star's challenges to their validity. Every other court that has considered a constitutional challenge to the MSA or to an escrow or related statute has likewise rejected it. *See* note 5 *supra*. Some of those decisions have been affirmed on appeal, and other appeals are pending. The courts below have had no difficulty applying the principles this Court has established to these issues; there

is no conflict among the circuits; and there is accordingly no issue regarding application of the MSA or escrow statute that calls for this Court's intervention.

The Court should deny Star's petition.

I. NEITHER STAR'S EQUAL PROTECTION CLAIM NOR ITS COMPACT CLAUSE CLAIM RAISE IMPORTANT FEDERAL QUESTIONS THAT NEED TO BE SETTLED BY THE COURT

Although Star asserts that certiorari should be granted to resolve supposedly unsettled "important question[s] of federal law" relating to Star's Equal Protection Clause challenge to the escrow statute and its Compact Clause challenge to the MSA, Star never identifies a single unsettled question of federal law requiring the Court's attention.

A. Equal Protection Challenge to Escrow Statute.

The court below correctly applied the deferential standard of review for equal protection analysis required in cases like the present one by *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993): "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all

relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); See also John E. Nowak & Ronald R. Rotunda, *Constitutional Law* 634 (6th ed. 2000) (At its core, the "equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government.").

As the Fourth Circuit correctly held, the Virginia escrow statute properly distinguishes between NPMs, which *have not* settled the Commonwealth's claims against them and which are required to make escrow payments, and Participating Manufacturers, which *have* settled those claims and which have agreed to significant restrictions on their conduct and are required to make equal or larger current payments to the Commonwealth. The Fourth Circuit also correctly found that Star could not meet "its very difficult burden" of establishing a violation of equal protection, App. 19a, by taking issue with the stated purposes of the Virginia statute.[9] This Court "will assume

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[9] Star cites such cases as *Romer v. Evans*, 517 U.S. 620 (1996), in which this Court struck, on equal protection grounds, an amendment to the Colorado Constitution that prohibited any governmental action designed to protect homosexuals from discrimination, and *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), in which the Court held that a zoning ordinance that singled out a group home for the mentally retarded as requiring a special use permit violated the Equal Protection Clause, in claiming that the Fourth Circuit tested the escrow statute against the wrong standard. Pet. 16. Those cases involved discrimination directed against individuals. The Fourth Circuit concluded that economic regulation cases such as *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955), and *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), in which this Court strongly cautioned courts not to substitute their social and economic judgments for those of lawmakers, were of more relevance to Star's due process and equal protection challenges. Applying the principles of those cases, the Fourth Circuit

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that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they *could not have been a goal of the legislation.*" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (emphasis added). Moreover, "we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). In rejecting Star's arguments, the Fourth Circuit properly applied this Court's teachings, observing that the Virginia General Assembly had stated a "fully articulated purpose" for the escrow statute: "to ensure that Virginia will be able to recover healthcare costs from cigarette manufacturers regardless of whether the manufacturer has signed on to the" MSA. App. 15a.

In the end, Star is left to argue that the escrow statute cannot survive rational basis review because the legislature's articulated purpose – which Star concedes is legitimate – could not have been its true purpose. Pet. 17. Yet, even if the General Assembly was motivated by something other than the purpose that was clearly and unambiguously stated in the statute – and there is no reason to believe that there was any such purpose – such "true purpose" is irrelevant. Indeed, "it is ultimately the provisions of our laws rather than the principal concerns

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had no difficulty disposing of Star's arguments under rational basis review.

of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).[10] Thus, as the Fourth Circuit correctly concluded, Star has fallen far short of establishing such a claim. Instead, its argument amounts to a quibble that in no way calls for further review by this Court.

Star first argues that the statute's articulated purpose of assuring a source of recovery of costs attributable to disease and death caused by tobacco products should be disregarded because Virginia could never recover such costs from a tobacco company like Star, which proclaims itself a "non-culpable cigarette compan[y]." Pet. 18-19. Even if Star's self-congratulatory claims regarding the adequacy of its warning labels and its attempts to develop less lethal tobacco products were true – claims with which the Commonwealth would take issue were it necessary to do so – they would hardly bear the burden of Star's argument. It may be that Star seeks merely to capitalize on the OPMs' past behavior, not duplicate it. *Id.* 18. But that is beside the point. Cigarettes are inherently dangerous products that inevitably will bring death and disease to Virginia's citizens, and the legislature has reasonably concluded that manufacturers like Star may be found liable for those consequences in the future even if the

[10] Over a century and a half ago, this Court explained: "In expounding this law, the judgment of the court cannot, in any degree, be influenced by . . . the motives or reasons assigned by [legislators] for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language there used. . . ." *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845).

grounds for liability are different from those previously asserted against the OPMs. Accordingly, the escrow statute's requirement that every manufacturer not a party to the MSA pay into escrow for its cigarettes sold in Virginia is rationally related to the legislature's articulated purpose.

Nor is Star's challenge to the stated purpose of the escrow statute strengthened by the fact that the Commonwealth specified, in the Virginia Circuit Court Consent Decree approving the MSA, that only 5 percent of the monetary payments received by the Commonwealth are to be attributed to the claims for reimbursement for past and future health care costs (as opposed to Virginia's claims seeking recovery for injury to the general economy of the Commonwealth and profit disgorgement). Contrary to Star's argument, this hardly means that 95 percent of the payments that continue into the indefinite future relate solely to liability "for *past* harm inflicted by the Original Participating Manufacturers," Pet. 18 (emphasis in original), let alone constitutes a "judicial admission" that that amount is "attributable to damages for prior misconduct that [Petitioner] has not committed." *Id.* 5. Virginia could just as easily have made no allocation in the Consent Order – as was the general practice in other Settling States – or indeed allocated all of the amounts it will receive as health care cost reimbursement. It is common in settlement contexts to allocate amounts to one or more particular claims to achieve tax or other ends even though the damages sought on each claim exceed the entire settlement amount. For present purposes, it is sufficient that the health care costs inflicted on the Commonwealth by NPM products almost certainly by themselves far exceed the escrow amounts NPMs are required to post on

a per cigarette basis, and the decision to require that escrow could therefore hardly be found to be "irrational."

Star also complains that certain Participating Manufacturers (i.e., SPMs that signed the MSA within 90 days) only make payments to the extent their market shares increase, which Star considers inconsistent with the purpose of having tobacco manufacturers bear the future costs of smoking-related disease. Pet. 19-20. Given that Star was free to sign the MSA within the 90-day period but chose not to do so, it hardly should be heard to complain about a business decision it now appears to regret. In any event, "for purposes of rational-basis review, the 'latitude of discretion is notably wide in . . . the granting of partial or total exemptions upon grounds of policy.'" *Nordlinger v. Hahn*, 505 U.S. at 17 (quoting *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). The treatment of SPMs who signed the MSA within 90 days was designed to provide an incentive for such companies to become parties to the Agreement, and thereby agree to significant advertising and marketing restrictions. It thus falls well within the "latitude of discretion" afforded the legislature under rational-basis review.[11]

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[11] Star also contends that the escrow statute fails rational-basis review because it would require an NPM to continue to make escrow payments even if a judgment were rendered, or a settlement reached, that resolved its future liability for harm caused by its cigarettes. Pet. 20. Star's argument is hypothetical in the extreme and ignores the many ways that would be available to ensure that such a situation would never exist. In any event, Star necessarily has made a facial challenge to the escrow statute, and "[t]he fact that the [statute] may operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. . . . " *United States v. Salerno*, 481 U.S. 739, 745 (1987).

B. Compact Clause Challenge to MSA.

All Compact Clause challenges since *Virginia v. Tennessee*, 148 U.S. 503 (1893) are measured by the settled test – i.e., whether the agreement is "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Id.* 519. *See also Northeast Bancorp, Inc. v. Board of Governors of the Fed. Res. Sys.*, 472 U.S. 159, 175-76 (1985); *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 471 (1978); *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976).

The Fourth Circuit found that one aspect of the MSA – the provision that authorizes an administrative body "to determine compliance with the" Agreement – provided a horizontal aspect to the MSA that constituted a compact among the States.[12] App. 37a. Applying the test of *Virginia v. Tennessee*, however, the court found that the MSA "does not increase the power of the States at the expense of federal supremacy," and therefore does not require Congress's consent. App. 38a. The interstate compact involved

[12] That body is "a nationally recognized firm of economic consultants (the 'Firm')," whose responsibilities under the MSA are in fact quite narrow. The Firm's principal function, under MSA Section IX (d)(1)(C), App. 128a-130a, is to determine, as a precondition to there being a payment reduction for a year in which there is a "Market Share Loss," whether the disadvantages Participating Manufacturers experienced as a result of the MSA "were a significant factor contributing to the Market Share Loss for the year in question." The Firm would also be called on to decide, if the issue were ever to arise, whether under Section IX (d)(2)(G), App. 136a-137a, legislation enacted by a Settling State that did not conform to the Model Statute in Exhibit T to the MSA was nevertheless a "Qualifying Statute."

in *Multistate Tax Commission* established an administrative body to coordinate State taxation of certain entities. Following this Court's lead in *Multistate Tax Commission*, the Fourth Circuit observed that the MSA may "result in an increase in bargaining power of the States vis-à-vis the tobacco manufacturers, but this increase in power does not interfere with federal supremacy because the Master Settlement Agreement 'does not purport to authorize the member States to exercise any powers they could not exercise in its absence.'" *Id.*, quoting *Multistate Tax Commission*, 434 U.S. at 473.

Star does not suggest abandoning the test of *Virginia v. Tennessee*. Nor does Star advocate any changes in this Court's Compact Clause jurisprudence, specify any new or unsettled legal question for this Court to decide, or identify any conflict in decisions of the lower federal courts. Star just contends that "[the] court of appeals erred . . . in concluding that the MSA is not the type of interstate compact that requires congressional consent under the Compact Clause." Pet. 23. The Fourth Circuit's supposed error does not justify review by this Court.[13] In any event, Star's arguments submerse on scrutiny.

At the outset, and notwithstanding the Fourth Circuit's disagreement with the district court on the issue, the

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[13] If the Court were to grant Star's petition for certiorari, Respondent would also urge the Court to hold that even if congressional consent to the MSA is required, Congress did consent. Specifically, the amendment provided that federal rules governing health overpayments "shall not apply to any amount recovered or paid to a state as part of *the comprehensive settlement of November 1998 between manufacturers of tobacco products . . . and State Attorneys General.*" 42 U.S.C. § 1396b(d)(3)(B)(i-ii) (Supp. V 1999) (emphasis added).

Commonwealth submits that Star lacks standing to raise the Compact Clause issue it poses in its Petition. According to Star, the MSA violates the Compact Clause because "the Settling States ceded a significant amount of their sovereignty to super-state entities that have the power to make final, non-appealable decisions" concerning the amount of the Participating Manufacturers' payments and their allocation among the Settling States, and whether a Settling State has diligently enforced its escrow statute. Pet. 23. Star, however, is a non-party to the MSA, and any impact on Star of any decision by these "super-state entities" would be oblique. Moreover, even were the Compact Clause somehow violated by States that "ceded sovereignty" to such entities, Section XVIII(o) of the MSA would simply require that the parties negotiate an alternative mechanism. Even a successful challenge by Star leaves untouched its obligations under the escrow statute. Accordingly, at least two of the three elements of standing established in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) are missing and Star's "bootstrap" attempt to claim standing, App. 52a, should be rejected.[14]

The most that could be said of the "super-state entity" able to make decisions regarding MSA payment obligations and allocations is that it could potentially affect one adjustment to the payments that the Participating Manufacturers make to the Settling States in any particular

[14] Moreover, while the United States certainly has standing to allege that its sovereignty is being diminished by an interstate agreement, it is not clear that private parties, such as Star, have standing to assert the federal government's interests.

year.[15] *See* note 12 *supra*. In fact, the States have no more ceded sovereignty to "super-state entities" than any government does by authorizing accounting bodies to make calculations according to fixed formulae.[16] But even had the States ceded a part of their sovereignty by such provisions, that would have no relevance under the Compact Clause because "the test is whether the Compact enhances state power *quoad* the National Government." *Multistate Tax Commission*, 434 U.S. at 473. No such enhancement exists.

Star contends that the Settling States could not attempt by individual settlements what they accomplished in the MSA. Pet. 23-24. Simply, Star is wrong. Each Settling State could have independently settled its claims against the Participating Manufacturers and included in a settlement agreement each of the MSA provisions that Star now questions, including calculating settlement payments by applying a percentage to the Participating Manufacturers' national market shares. *See id.* 23. Nor did the Fourth Circuit's rejection of Star's claim on appeal that the MSA derogates "the power of the federal government to regulate tobacco" constitute the application of "too

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[15] As for the other "power" to which Star refers, the MSA nowhere provides that any entity other than a Settling State's court decides whether that Settling State has diligently enforced its escrow statute.

[16] Star cites Section IX (d) of the MSA, App. 125a-149a, in which the Firm plays a role, as the only support for its reference to "super-state entities." Pet. 23. However, in referring to "decisions about . . . the amount of the payments owed by the Participating Manufacturers," *id.*, Star may also be alluding to the role of the "Independent Auditor," which, as provided in Section XI (a), makes all calculations based on the formulae in the MSA and on the information furnished to it. This role is essentially ministerial.

weak a test." *Id.* 24. Star's Compact Clause claim failed not because the court below applied the wrong test, but because Star was unable to demonstrate any way in which the MSA tended "to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Virginia v. Tennessee*, 148 U.S. at 519.

Petitioner merely invites mischief with the Constitution.

II. THE FOURTH CIRCUIT'S COMMERCE CLAUSE DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS OR ANY OTHER COURT

Star contends that the Fourth Circuit's rejection of Star's Commerce Clause challenge to the escrow statute "is inconsistent with the First Circuit's decision in *Consolidated Cigar v. Reilly*, 218 F.3d 30 (1st Cir. 2000), *rev'd in part on other grounds sub nom. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), and this Court's decision in *Healy v. Beer Institute*, 491 U.S. 324 (1989)." Pet. 15. No such inconsistency exists.

In *Consolidated Cigar*, the First Circuit reviewed a Massachusetts regulation that made cigar manufacturers liable if their cigars were sold by third parties in Massachusetts in packages lacking certain required warnings. The court held that the regulation was an impermissible burden on interstate commerce because in order to avoid liability under the regulation, the manufacturers had to place the warnings on all of their packages, no matter where the packages were ultimately to be sold, as they had no way of knowing which packages would be sold by third

parties in Massachusetts. 218 F.3d at 57-58. Star complains that it bears a similar burden, because in order to comply with the escrow statute, it must "sell only to Virginia distributors and retailers or to . . . out-of-state distributors at a cost that includes the escrow amount in anticipation that the product might be resold in Virginia, which would make the product noncompetitive in States that are not subject to the MSA." Pet. 26.

Star is required to make escrow payments only on its cigarettes on which excise taxes are paid to the Commonwealth. As the Fourth Circuit noted, only a limited number of distributors are authorized to affix the Virginia excise tax stamp, and these distributors already are required to track the number of cigarettes they stamp and report that information to the Commonwealth.[17] Accordingly, the court concluded, "any additional burden caused by requiring manufacturers to obtain this information from the distributors is minimal." *Id.* This "burden" is not remotely comparable to that of the manufacturers in *Consolidated Cigar*, who had to tailor their packaging to satisfy one State's requirement because they had no way of complying with the Massachusetts requirement once the cigars entered the stream of commerce.

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[17] Both wholesale and retail dealers have long had the duty to record interstate commerce in cigarettes to the Commonwealth, listing the kinds and quantity. See Code §§ 58.1-1004, 1008, and Art. 1, Chapter 10, Title 58.1 generally. Manufacturers of cigarettes produced in or shipped into or within the Commonwealth now must file monthly reports including the quantities of cigarettes. Va. Code § 58.1-1008.1 (Michie Cum. Supp. 2002). Star is not especially burdened by the NPM statute's counting requirements.

The Fourth Circuit's decision is also entirely consistent with *Healy*, invalidating a Connecticut statute that required out-of-state shippers to sell beer to Connecticut wholesalers at a price no higher than the prices at which they sold the beer in neighboring States. The Connecticut statute had the practical effects of controlling prices in other States and of interfering with their regulatory schemes. By contrast, the only transaction to which the escrow statute applies is the sale of cigarettes "within the Commonwealth." App. 73a; Va. Code Ann. § 3.1-336.2.A. Virginia does not insist on any kind of parity between the prices (or any other aspect or attribute) of cigarettes sold in Virginia and those of cigarettes sold elsewhere, and it does not control prices or the economics of transactions in other States, either directly or indirectly. The escrow statute is therefore readily distinguishable from the statute in *Healy*, as the Fourth Circuit correctly found. App. 29a.

Star would create parallels with *Healy* by arguing that the escrow statute may affect an out-of-state transaction – i.e., Star's sale of cigarettes to a distributor located in a State other than Virginia. Pet. 27. The escrow statute, however, does not "control" or "regulate" that transaction in any sense relevant to the *Healy* test. It may cause – but does not require – Star, a Virginia cigarette manufacturer, to include its escrow costs in the prices it charges to distributors, wherever they may be located, for cigarettes that are resold in Virginia. But in that way the escrow statute is no different from any other requirement that may affect interstate transactions, such as imposing liability on manufacturers for the in-state sale of dangerous or defective products or requiring that all products sold in-state meet state safety standards.

CONCLUSION

The petition for a writ of certiorari should be denied.

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